Ahmed Abdul Rahman v SPK-Sentosa Corp Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-60 OF 1996
SHAIK DAUD, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
3 SEPTEMBER 1998

Labour Law *— Industrial Court — Award — Appellant dismissed by first respondent — Industrial Court awarded appellant backwages — Other claims rejected — Award confirmed by High Court — Whether appellant entitled to the other claims — Whether quantum of damages was correct*

The appellant was dismissed by the first respondent. The Industrial Court ('the second respondent') had awarded the appellant backwages claimed for the period of two years and four months and rejected all other claims. The High Court confirmed the award made by the second respondent. The appellant appealed against the quantum of damages awarded by the second respondent. For the purpose of this appeal, four tables identified as Table A, Table B, Table C and Table D were produced. Table A were claims by the appellant in respect of benefits expressly provided for and quantifiable in his contract of service for the initial period of three years. Table B was in respect of all benefits for the initial period expressly provided for under the contract of employment and quantifiable through evidence. The claims in Table C were the same as those claimed in Table A. These claims would arise when the appellant exercised the option to be employed for another two years at the expiry of the first three years' employment. It was submitted that the time for the option had passed and if the appellant was not unlawfully dismissed he would have exercised the option. Table D were claims in respect of the same items as Table B but for the notional next two years when he was deemed to exercise his option under his contract to continue in the same post on the expiry of the initial three years.

Held, allowing the appeal:

Item 1 under Table A had been awarded by the Industrial Court and confirmed by the High Court and as such, that figure would stand. Item 2, the contractual gratuity upon completion of three years, and item 3, a claim for contractual bonus for three years, were allowed because the first respondent's counsel did not respond to them. Item 4 was the claim for the Employees' Provident Fund contribution which the first respondent conceded to. Item 5, a claim for paid annual leave, could only be made when the appellant actually went on leave while in the service of the first respondent. This was not supported by evidence and was rejected. Claims under Table B must be supported by evidence. These were rejected by the second respondent as no evidence had been adduced by the appellant. Therefore, the appellant's claims in respect of these benefits must be rejected. Under Table C, the appellant was not entitled to item 1,

salary for the notional two years, item 2, the contractual gratuity for the two years and item 3, the bonus. Payment of bonus by a company depends on its performance and the profits it makes. Since there was no evidence to that effect, this claim was too remote. Item 4, the claim for EPF contribution, was allowed because the first respondent's counsel stated that the appellant was entitled to it. Item 5 of Table C was rejected for the same reason item 5 under Table A was rejected. Table D were claims in respect of the same items as Table B but for the notional next two years when he was deemed to exercise his option under his contract to continue in the same post on the expiry of the initial three years. These were also rejected because no evidence was adduced by the appellant (see pp 316G–I and 317A–G).

[Bahasa Malaysia summary

Perayu telah dipecat oleh penentang pertama. Mahkamah Perusahaan ('penentang kedua') telah mengawardkan upah tertunggak kepada perayu yang dituntut untuk jangkamasa dua tahun dan empat bulan dan menolak segala tuntutan lain. Mahkamah Tinggi mengesahkan award yang dibuat oleh penentang kedua. Perayu merayu terhadap kuantum ganti rugi yang diawardkan oleh penentang kedua. Untuk tujuan rayuan ini, empat jadual yang dikenal pasti sebagai Jadual A, Jadual B, Jadual C dan Jadual D telah dikemukakan. Jadual A adalah tuntutan oleh perayu berkaitan dengan faedah-faedah yang diperuntukkan dan boleh dinyatakan kuantitinya dalam kontrak perkhidmatannya untuk tempoh permulaan selama tiga tahun. Jadual B adalah berhubung dengan segala faedah untuk tempoh permulaan yang dinyatakan secara jelas di bawah kontrak perkhidmatan dan boleh dinyatakan kuantitinya melalui keterangan. Tuntutan dalam Jadual C sama dengan yang dituntut dalam Jadual A. Tuntutan-tuntutan ini akan berbangkit apabila perayu melaksanakan opsyen untuk bekerja untuk dua tahun lagi selepas tamatnya tempoh pekerjaan tiga tahun pertama. Ia dihujahkan bahawa masa untuk opsyen telah berlalu dan sekiranya perayu tidak dipecat melanggar undang-undang ia tentunya melaksanakan opsyen tersebut. Jadual D adalah tuntutan berkaitan dengan butiran yang sama dengan Jadual B kecuali untuk tanggapan dua tahun lagi yang mana ia dianggap melaksanakan opsyennya untuk terus bekerja dalam jawatan yang sama bila tamatnya tempoh tiga tahun permulaan.

Diputuskan, membenarkan rayuan:

Butiran 1 di bawah Jadual A telah diawardkan oleh Mahkamah Perusahaan dan disahkan oleh Mahkamah Tinggi dan oleh yang demikian, angka itu akan kekal. Butiran 2, ganjaran kontraktual apabila tamatnya tiga tahun, dan butiran 3, tuntutan untuk bonus kontraktual bagi tiga tahun, dibenarkan kerana peguam penentang pertama tidak membalas kepadanya. Butiran 4 adalah tuntutan untuk caruman Kumpulan Wang Simpanan Pekerja yang disetujui oleh

penentang pertama. Butiran 5, tuntutan untuk cuti tahunan berbayar, hanya boleh dibuat apabila perayu benar-benar mengambil cuti semasa dalam perkhidmatan penentang pertama. Ini tidak disokong oleh keterangan dan telah ditolak. Tuntutan di bawah Jadual B mestilah disokong oleh keterangan. Ini telah ditolak oleh penentang kedua kerana tiada keterangan telah dikemukakan oleh perayu. Maka, tuntutan perayu berkaitan dengan faedah-faedah ini mestilah ditolak. Di bawah Jadual C, perayu tidak berhak mendapat butiran 1, gaji untuk dua tahun tanggapan, butiran 2, ganjaran kontraktual untuk dua tahun itu dan butiran 3, iaitu bonus. Bayaran untuk bonus oleh sesebuah syarikat bergantung pada prestasi dan keuntungan yang diperolehinya. Oleh kerana tiada keterangan demikian, tuntutan ini adalah terlalu terpencil. Butiran 4, tuntutan untuk caruman KWSP, dibenarkan kerana peguam penentang pertama menyatakan bahawa perayu berhak mendapatkannya. Butiran 5 Jadual C ditolak dengan alasan yang sama mengapa butiran 5 di bawah Jadual A ditolak. Jadual D adalah tuntutan berkenaan dengan butiran yang sama dengan Jadual B kecuali untuk tanggapan dua tahun selepas itu apabila ia dianggap melaksanakan opsyennya di bawah kontraknya untuk terus bekerja dalam jawatan yang sama bila tamatnya tiga tahun pertama. Ini juga telah ditolak sebab tiada keterangan dikemukakan oleh perayu (lihat ms 316G–I dan 317A–G).]

Notes

For cases on award by the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 919–934.

Cases referred to

Alloy Automotive Sdn Bhd v Enkei Automotive Co Ltd & Anor [1997] 3 MLJ 205 (refd)

Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 (refd)

Appeal from: Originating Motion No R2–25–125 of 1995 (High Court, Kuala Lumpur)

Su Tiang Joo (*S Sivaneindiren* with him) (*Cheah Teh & Su*) for the appellant.

Nurul Akmar bte Omar (*Haris bin Mohd Ibrahim* with her) (*Adam & Co*) for the first respondent.

Mokhtar Sidin JCA (delivering judgment of the court): In respect of appeal No W–04–60–1996, the appellant is Ahmed bin Abdul Rahman while the respondents are SPK-Sentosa Corp Bhd and Mahkamah Perusahaan Malaysia. In respect of appeal No W–04–59–96, the appellant is SPK-Sentosa Corp Bhd and the respondent is Ahmed bin Abdul Rahman. These appeals had been fixed for hearing at the same time. As such, for matter of convenience and to avoid any confusion, we will refer to Ahmed

bin Abdul Rahman as the appellant, SPK-Sentosa Corp Bhd as the first respondent and Mahkamah Perusahaan Malaysia as the second respondent. The second respondent is not concerned with the outcome of these appeals and as such, no one represented them at the hearing. A

These appeals arose from two separate originating summonses filed by the appellant and the first respondent against award No 263/95 made by the second respondent. Since there were two separate applications, each application was given a separate reference number. The High Court ordered the two originating summonses to be heard together, whereupon it dismissed both applications and confirmed award No 263/95 made by the second respondent. When the appeals came before us, they were accompanied by two motions, one by the appellant dated 9 July 1997 (encl 10a) and the other by the first respondent dated 23 April 1998 (encl 14a). B C

The appellant's motion is to strike out the notice of appeal and the appeal record filed by the first respondent. The first respondent's motion is for an extension of time to file a supplementary record of appeal and chronology of events. With the consent of both parties, we heard the two motions together as the outcome of one will also determine the other. D

Mr TJ Su, counsel for the appellant, submitted that the order under appeal is dated 30 July 1996 and the first respondent filed its notice of appeal on 28 August 1996. It then obtained an extension of time to file its record of appeal. A letter dated 21 January 1997 from the court informed the first respondent that the notes of evidence and grounds of judgment were ready. There is no evidence when the first respondent received the letter and as such the letter is deemed to have been received on 21 January 1997. Mr Su submitted further that by virtue of that letter, the first respondent was to file the record of appeal on or before 21 February 1997. On 5 February 1997, solicitors for the first respondent sent the draft index to the appellant's solicitors (p 30 of encl 14a). The appellant's solicitors realized that the draft index was in respect of the wrong appeal. It was clear that the draft index was sent in respect of Originating Summons No R2–125–95 when it was intended for Originating Summons No R2–124–95. On the same date, ie on 5 February 1997, the appellant's solicitors spoke to the first respondent's solicitors and pointed out the mistake and followed it up with a letter dated 5 February 1997. There was no reply to this letter but instead solicitors for the first respondent proceeded to file the appeal record on 13 February 1997. Mr Su indicated that had the first respondent's solicitors come back to him, he might be able to assist the first respondent in enclosing the necessary documents. Since solicitors for the first respondent did not do so, they became authors of their own problems. E F G H

Under the circumstances, Mr Su contended that the first respondent's appeal record is defective and no attempt had been made to rectify such defect. In applying to set aside the notice of appeal and the record of appeal filed by the first respondent, the appellant cited the following breaches committed by the first respondent: I

(a) Failure to provide a draft index for the approval of the appellant's solicitors.

(b) Failure to include in the record of appeal a copy of the notice of motion for an order of certiorari.

(c) Failure to include in the record of appeal a copy of the order granting leave by the High Court dated 15 January 1996.

(d) Failure to include in the record of appeal the 'notis usul' dated 18 January 1996.

(e) Failure to comply with r 18(10) of the Rules of the Court of Appeal 1994 requiring the filing of a chronology of events.

In her reply, Cik Nurul Akmar Omar, counsel for the first respondent who was also the solicitor in charge of this appeal, admitted the breaches as enumerated by the appellant's counsel. As to the draft index, she explained that after the appellant's solicitors spoke to her, she amended the draft index but by mistake sent the draft to her own client instead of sending it to the appellant's solicitors. As to the other breaches, she explained that she was having some problems with her firm of solicitors and as a result she left that firm but subsequently came back to the firm and was asked to handle the appeal again. She came to know about the breaches when she saw the motion (encl 10a) and this prompted her to file the motion (encl 14a).

It is difficult for us to accept her explanation because it is clear to us that when the record of appeal was filed she had not left the firm yet. It is obvious to us that all the documents were available to her. The faults were with her because she was the one who had handled the file then as evidenced by the correspondences that took place. It is clear that she was not vigilant.

It has been made clear that solicitors should at all times be vigilant and alert and also take regard to the rules as stated in the case of *Alloy Automotive Sdn Bhd v Enkei Automotive Co Ltd & Anor* [1997] 3 MLJ 205 where Abu Mansor JCA, in delivering the judgment of the court, said at p 209:

> This court viewed that there was a blatant disregard by the appellant's solicitors of the court's procedure. It is also the view of this court that to a certain extent, the appellant could not escape and was partly to blame for the delay in the filing of the appeal record. The appellant, we feel, should have been more vigilant and alert as to the state of its pending matter. We feel the appellant should have the attentiveness to check on the action of the solicitors it employed and paid for. If the case was delayed, the appellant should have pursued the matter as a diligent litigant and even to the extent of firing its solicitors and changing to a new solicitor who could do a better job. After all, it was paying and had the right to call the tune. The appellant was the master and the solicitors were only its agent. We could not subscribe and sympathize with the appellant's counsel's submission that his client presumed everything was in order until the letter from the Court of Appeal dated 29 June 1995.

In the case of *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191 it was held (at pp 194 and 195):

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But it is not an unprincipled discretion. There must be some relevant evidential material made available ... before the court may exercise discretion.
>
> In the present case, there was ... no reasonable explanation for the failure to serve and the delay in approaching this court. [Having taken] into account all that could be said in favour of the appellant, and [weighing] it against all the other circumstances of the case, [and also] having considered all the relevant circumstances, [the court] found [that it was] unable to exercise discretion in the appellant's favour.

It is clear that solicitors for the first respondent had committed the breaches pointed out by the appellant's solicitors. From the record, it is also clear that the appellant's solicitors had been kind enough to point out those breaches to her but she did nothing to remedy them until the motion in encl 10a was filed.

That being the case, we had no alternative but to allow the appellant's motion in encl 10a with costs and that consequently appeal No W–04–59–1996 is dismissed with costs. The deposit made by the first respondent in respect of that appeal is to be paid to the appellant towards his taxed costs. In view of our decision, the first respondent's motion in encl 14a is also dismissed with costs.

Main appeal No W–04–60–1996

Mr S Siva, counsel for the appellant submitted that the present appeal is only in respect of the quantum awarded by the second respondent which was confirmed by the High Court. (The second respondent had awarded the appellant's claim for backwages for the period of two years and four months totalling RM336,000. No other amount had been awarded because no receipts had been produced.)

For the purpose of this appeal, four tables identified as Table A, Table B, Table C and Table D were produced. Table A are claims by the appellant in respect of benefits expressly provided for and quantifiable in his contract of service for the initial period of three years. There are five items under this heading. Item 1 had been awarded by the Industrial Court and confirmed by the High Court. As such, that figure will stand. Item 2 is the contractual gratuity upon completion of three years. Counsel for the appellant submitted that the appellant at the time of dismissal was only eight months short of three years which would entitle him to this benefit. He was denied of this entitlement because of the wrongful dismissal. The first respondent's counsel did not respond to this. For that reason, we allowed this claim and the amount be paid to the appellant. Item 3 is a claim for the sum of RM144,000 in respect of contractual bonus for three years. The appellant's counsel contended that the appellant is entitled to it under the contract. Again there was no response from the first respondent and as such we allowed that amount. Item 4 is the claim for Employees' Provident Fund contribution amounting to RM117,000. The first respondent conceded to this claim and we allowed it. Item 5 is a claim for paid annual leave for the sum of RM36,000. It is obvious that the claim

could only be made when the appellant actually went on leave while in the service of the first respondent. This must be supported by evidence. No such evidence was given and as such we rejected this claim.

Table B is in respect of all benefits for the initial period expressly provided for under the contract of employment and quantifiable through evidence. Though it was admitted by the first respondent's secretary that the appellant was entitled to those benefits, it is clear to us and to the court below that the claims under this table must be supported by evidence. These were the claims that were rejected by the second respondent. No evidence had been adduced by the appellant that he hired a car or a chauffeur or produced the premiums paid by him for personal accident and health insurance. On that basis, we rejected the appellant's claims in respect of these benefits. Table D are claims in respect of the same items as Table B but for the notional next two years when he is deemed to exercise his option under his contract to continue in the same post on the expiry of the initial three years. For the same reasons we have rejected the appellant's claim under Table B, we also rejected the claims by the appellant under Table D.

The claims in Table C are the same as those claimed in Table A. As stated by the appellant's counsel, these claims will arise when the appellant exercises the option to be employed for another two years at the expiry of the first three years' employment. It was submitted that the time for the option had passed and if the appellant was not unlawfully dismissed he would have exercised the option. Further, it was submitted that the option is not remote because when the hearing before the second respondent took place, the date to exercise the option had passed. We are of the opinion that the appellant is not entitled to item 1 which is the salary for the notional two years and item 2 which is the contractual gratuity for two years. We are of the opinion that the appellant is not entitled to item 3 which is the bonus. Payment of bonus by a company depends on its performance and the profits it makes. Since there is no evidence to that effect, we consider this claim to be too remote. For the same reason as we had rejected item 5 under Table A, we also rejected the claim under item 5 of Table C. As for item 4 which is the claim for EPF contribution, we were mindful of rejecting it but counsel for the respondent conceded and stated that the appellant is entitled to it. For that reason, we allowed the claim under this item.

For the above reasons, we allowed the appellant's appeal and confirm his entitlements to be as follows:

Table A: Item 1 which has been awarded by the Industrial Court is confirmed.

Items 2, 3 and 4 are allowed.

Item 5 is disallowed.

Table B: The whole claim is disallowed.

Table C: Claims under Items 1, 2 and 4 are allowed.

Claims under Items 3 and 5 are disallowed.

Table D: The whole claim is disallowed.

We are mindful that we have allowed full costs to the appellant in his motion and in the dismissal of the first respondent's appeal. As such, for this appeal, we allowed $^1/_2$ costs to him here and in the court below and the deposit is to be refunded to him. At the request of the appellant's counsel, all payments in respect of this appeal are to be made to the appellant's solicitors.

Order accordingly.

Reported by David Lai